IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FILED
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CLERK
U. S. DISTRICT COURT
MIDDLE DIST. OF ALA.

BENJAMIN FRANKLIN, by Elijah Franklin, his father and next friend, et al.,

Plaintiffs,

UNITED STATES OF AMERICA,

Amicus Curiae,

NATIONAL EDUCATION ASSOC., INC.,

Plaintiff-Intervenor,

vs.

BARBOUR COUNTY BOARD OF EDUCATION, et al.,

Defendants.

CIVIL ACTION NO. 66-CV-2458

MEMORANDUM OPINION AND ORDER

I. FACTS AND PROCEDURAL HISTORY

This cause is before the court on a Motion to Intervene filed by Sherry Lane Carpenter; Evell Robinson; Ida B. Herring; Chamese Herring, by Ida Herring; Kevin Christopher; Martin Christopher by Kevin Christopher; and the Town of Louisville, Alabama on August 3, 2000.

In setting forth the relevant facts, for purposes of deciding the motion to intervene, the court accepts the nonconclusory allegations of the applicants for intervention. See Lake Investors Development Group, Inc. v. EGIDI Development Group, 715 F.2d 1256 (7th Cir. 1983).

This case was originally filed in 1966 and resulted in an Order setting forth steps to be taken to desegregate the Barbour County school system. In 1997, a Consent Decree was entered

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by this court, declaring that the facilities were unitary, and outlining actions to be taken to make the entire school system unitary. At the time of this Consent Decree, there were two high schools: Louisville High School and Clayton High School. The Consent Decree indicates that the racial composition of Louisville High School is 83% black and that the racial composition of Clayton High School is 99% black.

On June 26, 2000, with the agreement of the Plaintiffs in this case and the United States, the Barbour County Board of Education voted to close Louisville High School. Closure of Louisville High School means that the students who would have attended that school must now attend Clayton High School, which is being renamed "Barbour County High School.".

The applicants for intervention consist of the following: Sherry Lane Carpenter and Evell Robinson, who are staff members who have been notified that they will not be employed during the 2000/2001 school year; the parents of Chamese Herring and Martin Christopher, who are students who live in Louisville and who will have to attend Barbour County High School in Clayton; and the Town of Louisville.

On August 10, 2000, this court conducted a hearing during which it listened to extensive argument on the Motion to Intervene. Based on all of the briefs and evidence submitted to the court, and the oral arguments of the parties and the applicants for intervention, and for the reasons to be discussed below, the Motion to Intervene is due to be DENIED.

II. DISCUSSION

Intervention of right is governed by Federal Rule of Civil Procedure 24(a). Rule 24(a) allows a third party to intervene as a matter of right if four requirements are met: (1) the application to intervene is timely; (2) the applicant has an interest relating to the property or

transaction which is the subject of the action; (3) the applicant is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) the applicant must demonstrate that his interest is inadequately represented by existing parties to the suit. Purcell v. BankAtlantic Financial Corporation, 85 F.3d 1508 (11th Cir. 1996). If there is no right to intervene under Rule 24(a), it is wholly discretionary with the court whether to allow intervention under Rule 24(b). Purcell, 85 F.3d at 1513.

It has long been recognized that parents have an intense interest in the education of their children. Graves v. Walton County Bd. of Educ., 686 F.2d 1135 (5th Cir. 1982).[1] The interest which must be demonstrated for persons to be entitled to intervention as of right in a school desegregation case, however, is an interest in a desegregated school system. United States v. Perry Bd. of Ed., 567 F.2d 277 (5th Cir. 1978). It is with the focus upon an interest in a desegregated school system, therefore, that the court will first analyze the asserted interests of the applicants for intervention in this case.

The court begins with the Town of Louisville. In the Motion to Intervene, the applicants for intervention state that the Town of Louisville will be injured by consolidation of the schools because of the adverse effect on the economy of Louisville, the adverse effect on community spirit and pride, the adverse impact on the academic performance of the children, and a greater risk of danger or injury to the children. These interests, however, are not interests in the desegregation of the school system, which is the only interest over which this federal court exercises its jurisdiction. The Town of Louisville's apparent political disagreement with the

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[1] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Barbour County Board of Education is not a legally cognizable interest in this desegregation lawsuit that will allow for intervention as of right. See United States v. State of Georgia, 19 F.3d 1388 (11th Cir. 1994). Accordingly, this applicant for intervention has not demonstrated a legally cognizable right sufficient to entitle it to intervention as of right.

Applicants for intervention Sherry Lane Carpenter and Evell Robinson are staff members who are no longer employed with the Barbour County Board of Education. Apparently, their only stated interest is in their continued employment. Such an interest in not an interest in the desegregation of the school system. Accordingly, these applicants for intervention have not demonstrated that they are entitled to intervention as of right.

The remaining applicants for intervention are the parents of a black and a white student who would have attended Louisville High School. At the hearing held on the Motion to Intervene, attorneys for the applicants for intervention stated that the interests of the black and white applicants for intervention are the same: ensuring the desegregation of the school system. They argue that the decision to close Louisville High School and to consolidate it with Clayton High School does not serve the purpose of desegregation because the decision will cause substantial white flight and because the burdens of closure will be born by the black community. Without determining the merits of these issues in the context of the Motion to Intervene, this court notes that reliance on "white flight" has been rejected by the Eleventh Circuit. See Stell v. Savannah-Chatham County Bd. of Educ., 888 F.2d 82, 85 (11th Cir. 1989). The court also notes that, according to counsel for the applicants for intervention, the number of white students whom counsel speculates will not attend the new consolidated high school is approximately twenty.

The issue before this court is whether the concerns and interests identified by the applicants for intervention are adequately represented by the existing parties. "If the court

determined that the issues [the proposed intervenors] sought to present had been previously determined or if it found that the parties in the original action were aware of these issues and completely competent to represent the interests of the new group, it could deny intervention." Hines v. Rapides Parish School Board, 479 F.2d 762, 765 (5th Cir.1973). It is well-established that courts presume that a proposed intervenor's interest is adequately represented when an existing party pursues the same ultimate objective as the party seeking intervention. United States v. State of Georgia, 19 F.3d 1388 (11th Cir. 1994). To demonstrate that such interests are not represented, there must be a showing of gross negligence or bad faith on the part of the parties in this case. Id. at 1394. In addition, when the United States is a party, the moving party must make a very compelling showing that representation of the public interest is inadequate. See Jones v. Caddo Parish School Bd., 704 F.2d 206, 221 n.25 (5th Cir. 1983).

In this case, the applicants for intervention have not rebutted the presumption of adequacy of representation by the Barbour County Board of Education or the Plaintiffs, nor have the applicants for intervention made a compelling showing of inadequacy of representation by the United States. The applicants for intervention have argued that the Plaintiffs and the United States have not adequately represented their interests because, although they now state that a motion should have been filed in this court before the decision was made to consolidate the schools, the Plaintiffs and the United States did not insist that such a motion be filed before the decision was made to close Louisville High School. At the hearing, attorneys for the parties in this case represented that the Plaintiffs and the United States were involved in the decision to close Louisville High School. This indicates to the court that the failure to file the appropriate motion was perhaps an oversight, but was an oversight which occurred within the context of an understanding by all of the parties, and was not the product of gross negligence, bad faith,

collusion, or ineffective counsel. See United States v. South Bend Comm. School Corp., 692 F.2d 623, 628 (7th Cir. 1982). Accordingly, while the applicants for intervention understandably may wish to present their arguments themselves, the court concludes that the Plaintiffs and the United States are aware of the issues raised by the applicants for intervention and are competent to represent these issues. The court concludes, therefore, that the applicants for intervention are not entitled to intervention as of right.

The applicants for intervention have also sought permissive intervention in this case. Federal Rule of Civil Procedure 24(b) allows permissive intervention if the application to intervene is timely, and if the intervenor's claim or defense and the main issue of the cause have a common question of fact. Id. In exercising its discretion to grant or deny permissive intervention, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Id.

As stated in open court, based on the representations made by attorneys representing the various parties at the hearing held on the Motion to Intervene, it appears to this court that the Board of Education, the Plaintiffs, and the United States have for a long period of time been working together toward achieving unitary status in all aspects of the school system of Barbour County, and that such efforts are active and ongoing. To allow intervention of the applicants for intervention would unnecessarily complicate, and indeed could impede, the ongoing process of negotiating toward the ultimate goal of desegregation. The court concludes, therefore, that this undue complication will unduly delay or prejudice the adjudication of the rights of the original parties, and the permissive intervention is due to be DENIED. Fed. R. Civ. Pro. 24(b); see also United States v. Coffee County Board of Educ., 134 F.R.D. 304 (S.D. Ga. 1974)(denying permissive intervention where intervention would hamper ongoing negotiations over a plan to

desegregate). Although this court is denying intervention to the applicants, the court will, as stated at the conclusion of the hearing on this matter, in ruling on the merits of the school closure decision, consider the evidence submitted by the applicants for intervention which has been filed with the court. Moreover, the applicants for intervention are given permission to file an amicus curiae brief in support of their position, should they choose to do so, by August 31, 2000.

III. CONCLUSION

For the reasons discussed, the court concludes that the applicants for intervention are not entitled to intervene as of right, and this court exercises its discretion to deny permissive intervention. Accordingly, it is hereby ORDERED as follows:

1. The Motion to Intervene and the accompanying Motion to Show Cause are DENIED.

2. The Motion to Deny Intervention is DENIED as moot.

3. The Motion to Amend the Motion to Intervene is GRANTED.

4. The applicants for intervention are GRANTED permission to file an amicus curiae brief on or before August 31, 2000, should they choose to do so.

5. The clerk is DIRECTED to serve copies of this Memorandum Opinion and Order by facsimile.

Done this 14th day of August, 2000.

W. HAROLD ALBRITTON
CHIEF UNITED STATES DISTRICT JUDGE

CIVIL APPEALS CHECKLIST

1. Appealable Orders: Courts of Appeals have jurisdiction conferred and strictly limited by statute:
Appeals from Final Orders Pursuant to 28 U.S.C. § 1291: Only final judgments for orders of district courts (or final orders of bankruptcy courts which have been affirmed by a district court under 28 U.S.C. § 158) usually are appealable. A "final" order is one which ends the litigation on its merits and leaves nothing for the district court to do but execute the judgment. A magistrate's report and recommendation is not usually final until judgment thereon is entered by a district court judge. Compare Fed.R.App.P. 5.1, 28 U.S.C. § 636(c).

In cases involving multiple parties or multiple claims, a judgment as to fewer than all parties or all claims is not a final, appealable decision. Fed.R.Civ.P. 54(b) does permit the district court to expressly direct entry of the judgment as fewer than all of the claims or parties. See Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1369 (11th Cir. 1983), cert. denied 464 U.S. 893 (1983). Certain matters, such as attorney's fees and costs, are collateral and do not affect the time for appealing from the judgment on the merits. Buchanan v. Stanships, Inc., 495 U.S. 265, 108 S.Ct. 1130, 99 L.Ed 2d 289 (1988); Budinich v. Becton, 485 U.S. 196, 108 S.Ct. 1717, 100 L.Ed 2d 178 (1988).

Appeals Pursuant to 28 U.S.C. § 1292(b) and FRAP 5: The certificate specified in 28 U.S.C. § 1292(b) must be obtained before an application for leave to appeal is filed in the Court of Appeals. Denial or refusal by the district court to issue the certificate is not itself appealable.

Appeals Pursuant to 28 U.S.C. § 1929(a): Pursuant to this statute, appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions . . ." This statute does not permit appeals from temporary restraining orders.

Appeals pursuant to Judicially Created Exceptions to the Finality Rule: These limited exceptions are discussed in many cases, including (but not limited to): Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed 2d 1528 (1949); Forgay v. Conrad, 6 How. (47 U.S.) 201 (1848); Gillespie v. United States Steel Corp., 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed 2d 199 (1964); Atlantic Federal Savings & Loan Assn. Of Ft. Lauderdale v. Blythe Eastman Paine Webber, Inc., 890 F.2d 371 (11th Cir. 1989). Compare Coopers and Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed 2d 351 (1978); Gulfstream aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed 2d 296 (1988)

2. Time for Filing: To be effective a notice of appeal must be timely filed. Timely filing is jurisdictional. In civil cases FRAP 4(a) and 4(c) set the following time limits:

FRAP 4(a)(1): The notice of appeal required by FRAP 3 "must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry . . ." (Emphasis added) To be effective, the notice of appeal generally *must be filed in the district court clerk's office within the time permitted. If a notice of appeal is mailed, it must be* timely received and filed by the district court to be effective. FRAP 4(c) establishes special filing provisions for notices of appeal filed by an inmate confined in an institution, as discussed below.

FRAP 4(a)(3): "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires." (Emphasis added)

FRAP 4(a)(5) and FRAP 4(a)(6): The district court has power to extend the time to file a notice of appeal. Under FRAP 4(a)(5) the *time may be extended if a motion for extension if filed within 30 days after expiration of the time otherwise permitted to file notice* of appeal. Under FRAP 4(a)((6) the time may be extended if the district court finds upon motion that a party has not received notice of entry of the judgment or order and that no party would be prejudiced by an extension.

FRAP 4(c): "If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or be a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid.

3. Format of Notice of Appeal: Form 1, FRAP Appendix of Forms, is a suitable format. See also FRAP 3(c).
A single notice of appeal may be filed from a (single) judgment or order by two or more persons whose "interests are such as to make joinder practicable . . ." (FRAP 3(b))

4. Effect of Notice of Appeal: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction (see Fed.R.Civ.P. 60) or to rule on a timely motion of the type specified in FRAP 4(a)(4)